

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

LIONEL A. PANDY,

Defendant and Appellant.

B205673

(Los Angeles County
Super. Ct. No. NA068848)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gary J. Ferrari, Judge. Remanded with instructions.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Xiomara Costello, Supervising Deputy Attorney General, Eric E. Reynolds, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Lionel A. Pandy (defendant) contends that the trial court improperly failed to determine whether and to what extent he was entitled to custody credits for time he spent in court-ordered drug treatment programs. He also complains that a trial court minute order and his abstract of judgment incorrectly reflect the imposition of an \$800 restitution fine rather than the \$200 fine orally imposed by the trial court. We agree with both contentions. We remand for recalculation of defendant's custody credits and order the trial court's January 28, 2008 minute order and the abstract of judgment corrected.

BACKGROUND

On January 14, 2006, defendant was arrested by the Long Beach Police Department after selling rock cocaine to a police informant. Defendant was charged with and pleaded no contest to one count of offering to sell cocaine (Health & Saf. Code, § 11352, subd. (a)) (count 1), and one count of possession of cocaine (Health & Saf. Code, § 11350, subd. (a)) (count 2). On count 1, the trial court imposed and suspended a mid term sentence of four years in state prison, and placed defendant on three years formal probation. On count 2, the trial court sentenced defendant to the low term of 16 months and ordered the sentence stayed pursuant to Penal Code section 654.¹ Defendant was given 102 days of presentence credit, consisting of 68 days of actual custody and 34 days of conduct credit. The trial court also imposed a \$200 restitution fine, a \$50 laboratory analysis fee, and a \$20 court security assessment.

In July 2006, defendant's probation officer reported that defendant had tested positive for cocaine. The trial court found that defendant was not in violation of his probation, but modified defendant's probation to require defendant "to complete a long term drug rehab program of 6 months minimum." In September 2006, defendant enrolled

¹

Further statutory references are to the Penal Code unless stated otherwise.

in the Family Services of Long Beach drug and alcohol program, but he was expelled after only three weeks because of his failure to attend mandatory programs.

In January 2007, defendant stipulated that he was in violation of his probation. The trial court revoked his probation and then reinstated it on the same terms and conditions, with the added requirement that defendant was to serve 90 days in county jail at the Acton or Warm Springs drug program. Defendant was given custody credits for 56 days, consisting of 38 days of actual custody and 18 days of conduct credit. Defendant waived custody credit “for purposes of Action [*sic*] or Warm Springs program.” Two weeks later, because defendant was unable to get into either Acton or Warm Springs, the trial court modified defendant’s probation to require him to complete a six-month Veterans Administration program.

In or about April 2007, defendant’s probation officer reported that defendant had missed a random drug test and had failed to keep the Probation Department advised of his address and telephone number. In May 2007, the trial court modified defendant’s probation to require defendant to participate in a one-year residential treatment program at New Dimensions. The trial court thereafter denied defendant’s motion to shorten the program to six months.

In October 2007, defendant was expelled from his treatment program for having property in his locker that appeared to be stolen. On November 13, 2007, defendant was remanded into custody. On January 28, 2008, after a formal hearing, the trial court found that defendant was in violation of and revoked his probation. The trial court imposed the four year sentence previously suspended, and ordered defendant to pay a \$200 restitution fine, a \$20 court security fee, and a \$50 laboratory analysis fee. The trial court gave defendant a total of 217 days of custody credit, consisting of the 102 days of credit given at the time of his original sentencing; 77 days of actual custody since he was remanded into custody on November 13, 2007; and an additional 38 days of conduct credit.

DISCUSSION

A. Custody Credit

When a criminal defendant who “has been in custody” is convicted and sentenced, the defendant is entitled to have “all days of custody . . . credited upon his or her term of imprisonment” (§ 2900.5, subd. (a).) “Custody” includes “any time spent in a jail, camp, work furlough facility, halfway house, *rehabilitation facility*, hospital, prison, juvenile detention facility, or similar residential institution” (*Ibid.*, italics added; see *People v. Jeffrey* (2004) 33 Cal.4th 312, 318; *People v. Davenport* (2007) 148 Cal.App.4th 240, 245.)

“It shall be the duty of the court imposing the sentence to determine the date or dates of any admission to, and release from, custody prior to sentencing and the total number of days to be credited pursuant to this section.” (§ 2900.5, subd. (d).) “Penal Code section 2900.5 imposes on the sentencing court the obligation to determine the number of days of custody and, in those cases to which it expressly applies, conduct credit to which the defendant is entitled” (*People v. Sage* (1980) 26 Cal.3d 498, 508-509.)

California Rules of Court, rules 4.310 and 4.472² both provide in relevant part, “On referral of the defendant to the probation officer for an investigation and report under Penal Code section 1203(b) or 1203(g), or on setting a date for sentencing in the absence of a referral, the court must direct the sheriff, probation officer, or other appropriate person to report to the court and notify the defendant or defense counsel and prosecuting attorney within a reasonable time before the date set for sentencing as to the number of days that defendant has been in custody and for which he or she may be entitled to credit. Any challenges to the report must be heard at the time of sentencing.” Accordingly, “the trial court . . . has the capability of determining the facts from which the [custody] credit

²

All rule references are to the California Rules of Court.

may be computed. If the court does not have enough facts at the time of sentencing, *its duty is to direct ‘the sheriff, probation officer or other appropriate person’ to produce the information*. At the time sentence is pronounced, the defendant and his attorney will be present and will have seen what is in the reports submitted to the court on this subject.” (*People v. Montalvo* (1982) 128 Cal.App.3d 57, 62, italics added [quoting former Rule 252, now Rules 4.310 and 4.472]; see also *People v. Wischemann* (1979) 94 Cal.App.3d 162, 175 [remand to trial court required when record “does not contain competent evidence of the duration of defendant’s incarceration”].)

It is apparent from the transcript of the probation revocation hearing that the trial court did not have sufficient information to calculate defendant’s custody credit. Although the trial court was aware that defendant had been awarded 102 days of custody credit at his original sentencing hearing, the trial court stated, “I don’t know what he’s served recently. [¶] . . . [¶] Because I went through the minute orders and I couldn’t find it.” Defendant’s probation officer was present and testified at the hearing, but he did not know how much time defendant had spent in custody, either. When asked by the trial court whether defendant had served time after his original sentencing, the probation officer responded, “I’m in narcotics testing, your Honor, I don’t toll the time.” The trial court responded in surprise, “You don’t keep track?” In addition, neither the trial court nor anyone else at the hearing accounted for the fact that defendant had been awarded an additional 56 days of custody credit in January 2007, and those credits were not included in the trial court’s final calculation of defendant’s custody credit.

Furthermore, there was no discussion at the hearing regarding whether defendant should receive credit for the time he spent in rehabilitation facilities, notwithstanding the probation officer’s testimony that at least one of those facilities was an “accredited residential drug program.” ~ (RT E-3) ~ The record contains no other evidence, and the trial court made no findings regarding whether the various treatment facilities defendant attended qualified as residential rehabilitation facilities under section 2900.5, subdivision (a).

Moreover, it is clear from the hearing transcript that neither defense counsel nor the prosecutor was notified a “reasonable time” prior to the hearing as to the number of days that defendant was in custody and for which he may be entitled to credit. (Rules 4.310, 4.472.) Defendant was thus deprived of a meaningful opportunity to litigate whether he was entitled to additional credit for time he spent in residential drug treatment facilities, and if so, how much. (See Rules 4.310 and 4.472 [“Any challenges to the report must be heard at the time of sentencing”].) For these reasons, the award of custody credit cannot stand. We remand for the trial court to determine whether defendant is entitled to custody for time he spent in various drug treatment facilities, and if so to calculate defendant’s custody credit based on appropriate evidence.³

B. Fines

At both defendant’s original sentencing hearing and at the probation revocation hearing, the trial court orally imposed a \$200 restitution fine pursuant to section 1202.4, subdivision (b). At neither proceeding did the trial court orally impose a probation revocation restitution fine pursuant to section 1202.44. Nevertheless, the trial court’s minute order dated January 28, 2008 and the abstract of judgment reflect the imposition of restitution and probation revocation restitution fines of \$800 each.

Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186; *People v. Walz* (2008) 160 Cal.App.4th 1364,

³

Because the issue regarding defendant’s custody credits is not the sole issue on appeal, section 1237.1 does not bar defendant from asserting that error even though he has not raised the issue in the trial court. (*People v. Acosta* (1996) 48 Cal.App.4th 411, 427; *People v. Florez* (2005) 132 Cal.App.4th 314, 318, fn. 12.) The People argue that we should nevertheless exercise our inherent authority to dismiss the appeal so that defendant can present the issue to the trial court in the first instance. (See *People v. Wrice* (1995) 38 Cal.App.4th 767, 773; *People v. Fares* (1993) 16 Cal.App.4th 954, 958.) We decline to do so.

1367, fn. 3.) The minute order and abstract must be corrected to reflect that the amount of the restitution fine imposed pursuant to section 1202.4, subdivision (b) is \$200.

Furthermore, section 1202.44 mandates the imposition of a probation revocation restitution fine in the same amount as the restitution fine. The trial court's failure to impose a fine pursuant to section 1202.44 was an unauthorized sentence that we have the inherent power to correct on appeal. (*People v. Guiffre* (2008) 167 Cal.App.4th 430, 435; see also *People v. Taylor* (2007) 157 Cal.App.4th 433, 438.) Because defendant's probation was revoked, the section 1202.44 fine is now due and payable. (*People v. Guiffre, supra*, 167 Cal.App.4th at p. 435.)

DISPOSITION

We remand to the trial court to recalculate defendant's custody credit. Prior to holding a hearing on this matter, the trial court shall direct the sheriff, probation officer, or other appropriate person to report to the trial court, and to notify the defendant or defense counsel and the prosecuting attorney within a reasonable time prior to the hearing, as to the number of days that defendant has been in custody and for which he or she may be entitled to credit, as set forth in Rules 4.310 and 4.472 and the body of this opinion. The trial court shall make appropriate findings of fact and shall state on the record the reasons for its determination of defendant's custody credit. We further order the trial court's minute order of January 28, 2007 and the abstract of judgment corrected to reflect the imposition of a \$200 restitution fine pursuant to section 1202.4, subdivision (b), and a \$200 probation revocation restitution fine pursuant to section 1202.44. Both fines are now due and payable. Upon recalculation of defendant's custody credit, the

.

clerk of the superior court is to prepare an amended abstract of judgment and to forward a copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.